ATESHOGLOU & AIELLO, P.C.

Attorneys

Steven D. Ateshoglou
Philip V. Aiello
Nicholas K. Neonakis*

*** NY and NJ Bar**

11 Park Place, Suite 1715
New York, New York 10007

tel. (212) 545-1740
fax (212) 545-7514
www.atesh.com

July 13, 2016

Via ECF
The Honorable Roslynn R. Mauskopf
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Josifidis v. Schneiderman, et al.
Docket No.: 16-CV-1944 (RRM) (RER)

Your Honor:

This firm represents the plaintiff Dr. Harry Josifidis (hereinafter "Plaintiff") in the above-referenced action. We are writing in response to the correspondence of Assistant Attorney General Linda Fang dated June 15, 2016 on behalf of the "OAG and OMIG Defendants" (hereinafter the "Defendants") requesting a pre-motion conference, pursuant to Section III.A.2 of Your Honor's Individual Rules.

We respectfully disagree with Defendants' basis for their anticipated Federal Rule of Civil Procedure Rule ("FRCP") 12(b)(1), (b)(2), and (b)(6) motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim for the reasons hereinafter set forth.

Factual Background and Procedural History

Plaintiff was a medical doctor and maintained a medical office in Queens County. His license to practice medicine in New York was revoked on December 6, 2010 (hereinafter the "Revocation"). The Revocation was based on findings relating solely to billing and recordkeeping. A temporary stay of the Revocation was ordered by a justice of the Appellate Division, Third Department on January 14, 2011, and a permanent stay of the Revocation was granted on March 7, 2011 (hereinafter the "Stay"). The Stay permitted Plaintiff to continue to legally practice medicine until the conclusion of all judicial proceedings relating to the Revocation. On November 10, 2011, the Appellate Division, Third Department affirmed the Revocation, and Plaintiff moved for leave to appeal to the New York State Court of Appeals. Plaintiff's motion to appeal to the Court of Appeals was denied by order dated May 1, 2012, and within five days of service of the Court of Appeals decision with notice of entry, Plaintiff filed and served a motion for re-argument to the Court of Appeals on May 21, 2012 (hereinafter the "Motion for Re-Argument").

The Motion for Re-Argument stated, in part, that "[b]ecause petitioner filed within the required five-day window, pursuant to CPLR 5519(e), the stay which was granted by the Appellate Division, Third Department on March 7, 2011 shall by automatic operation of law remain in effect pending determination of this request for re-argument of the motion for leave to appeal." The motion invoking the continuation of the Stay was served on the Attorney General, who did not submit opposition to Plaintiff's position that the Stay remained in effect pending the motion.

The Motion for Re-Argument was pending on August 9, 2012, when Plaintiff was arrested at his office without a warrant and charged with Class E Felonies. The arrest followed an undercover operation. The undercover operation and arrest were not conducted by the police, but by Defendants and others individuals employed by the Attorney General and the New York State Department of Health.

The prosecution was by the Office of the Attorney General in Supreme Court, Queens County, and continued for more than three years. Plaintiff was tried and found not guilty of all pending criminal charges before the Honorable B. Schwartz on April 23, 2015.

Defendants incorrectly argue that the facts underlying the claims in this action are merely issues of public record is inaccurate. As stated in the Complaint, Plaintiff's claims "are based upon the personal observations of Plaintiff regarding events that took place in his presence" and on "documents prepared in connection with the arrest and/or criminal prosecution of Plaintiff", of which Plaintiff is in possession of a substantial record of and which are not subject to judicial notice. [Complaint par. 28]. The evidence in Plaintiff's possession includes the aforesaid fact that prior to Plaintiff's arrest, Plaintiff's attorney had communicated directly with one or more Defendants employed by the Attorney General and discussed the fact that the Stay remained in effect while the Motion for Re-Argument was pending, and that at least one Defendant acknowledged that there was no judicial opinion to support the position that it was not. As previously stated, and as alleged in the Complaint, the Motion for Re-Argument specifically and explicitly invoked the continuation of the stay and the Attorney General did not seek to lift or contest the Stay. The details of the under-cover operation conducted by Defendants which led to Plaintiff's arrest, and the communications between Defendants are not a matter of public record.

Personal Jurisdiction

Defendants incorrectly argue lack of personal jurisdiction because some individual Defendants have not yet been served. This case was commenced on April 20, 2016 and is still within the ninety (90) day timeframe for service pursuant to FRCP 4(m). Plaintiff has attempted service on Defendants Thomas Burke and Vito Spano at the Office of the Attorney General, and upon learning of their retirement is actively attempting to effectuate personal service. Plaintiff has also attempted service on Defendant Fern DePaulo at multiple locations of the Office of the Medicaid Inspector General, where service has been repeatedly denied, and is similarly attempting to effectuate service. Accordingly, Defendants' anticipated motion for dismissal pursuant to FRCP 12(b)(1) and (b)(2) is presently premature.

Plaintiff's Claims

Defendants incorrectly argue that Plaintiff's complaint is not adequately pled. Plaintiff's complaint does not merely contain legal conclusions, but provides concrete factual allegations of the unlawful acts of the defendants (individually and collectively) during the investigation, arrest and criminal prosecution of Plaintiff.

Defendants incorrectly argue that the Complaint does not allege any concrete facts to rebut the presumption of probable cause created by the grand jury indictment. The Complaint alleges that the grand jury voted the Indictment charging Plaintiff with crimes, "solely because, as a result of Defendants' acts or omissions: a) the grand jury was not fully advised of the applicable law; b) relevant available evidence was withheld from the grand jury; c) material available witnesses were withheld from the grand jury; d) Plaintiff was not given the opportunity to testify before the grand jury though he had served notice of his intent to do so; and e) Plaintiff was denied his right to counsel during the grand jury proceedings." [Complaint par. 51]. Where, as here, a grand jury proceeding is compromised, it cannot support a presumption of probable cause. Morse v Fusto, 804 F.3d 538 (2d Cir. 2015)

Defendants incorrectly argue that Defendants have absolute prosecutorial immunity. However, Plaintiff was not arrested by the police. The individual defendants were involved in the investigation, undercover operation, the decision to arrest Plaintiff, and in his actual arrest. Where, as here, a prosecutor performs the investigative functions normally performed by a detective or police officer his immunity is not absolute. Morse v Fusto, supra.

Defendants argue that Plaintiff's state claims accrued in 2012, and that because a "notice of claim" was not filed until July, 2015, and this action was not commenced until April 20, 2016, the state claims are untimely pursuant to applicable statutes. As Plaintiff has not made a claim against a municipality, a notice of claim is not required. With the exception of the false arrest and imprisonment claim, the state claims are not time barred. All state claims involve a course of conduct by Defendants that continued until the conclusion of their prosecution of Plaintiff. A claim for malicious prosecution accrues on the date of acquittal which was April 23, 2015. This action was commenced within one year and is timely.

Defendants argue that ultimately this case involves a pure issue of law, that the Stay was not in affect pursuant to CPLR 5519(e) at the time of Plaintiff's Arrest and that Plaintiff was "mistaken" as to the law. In fact, as he was acquitted after trial on the merits, it was Defendants and the Attorney General rather than Plaintiff who were "mistaken" as to the law. Defendants' argument that the Stay was not in effect is not based on any reasonable reading of CPLR 5519 or on any established or judicial interpretation of the statute. In fact, it is not an interpretation of the applicable law at all. It merely re-states Defendants' inaccurate position regarding the applicable statute, that was improperly stated to the Grand Jury, and at trial in Supreme Court, in a futile effort to justify the Defendants' illegal and unjustifiable arrest and prosecution.

Respectfully submitted,

Steven D. Ateshoglou (SA 4934)

cc: Linda Fang, Esq. (via ECF)